

APPEAL NO. 042347
FILED NOVEMBER 1, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on August 25, 2004. The hearing officer determined that the respondent's (claimant) impairment rating (IR) is 27%, as assigned by the Texas Workers' Compensation (Commission)-appointed designated doctor. The appellant (carrier) appealed the hearing officer's IR determination, arguing that the designated doctor's IR is based on spinal surgery that occurred after statutory maximum medical improvement (MMI). The claimant responded, urging affirmance.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on _____; that the date of statutory MMI is August 24, 2000, and that the Commission-appointed designated doctor is Dr. S. It is undisputed that the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides) was the correct edition to be used in this case.

Section 408.125(e) provides that for a compensable injury that occurred before June 17, 2001, the report of the designated doctor chosen by the Commission shall have presumptive weight, and the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary, and that if the great weight of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Commission, the Commission shall adopt the IR of one of the other doctors. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)), which became effective March 14, 2004, provides that "[a]ssignment of an [IR] for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination." That rule has been interpreted to mean that the IR shall be based on the condition as of the MMI date and is not to be based on subsequent changes, including surgery. See Texas Workers' Compensation Commission Appeal No. 040313-s, decided April 5, 2004.

The evidence reflects that the claimant underwent spinal surgery to his L5-S1 level on October 8, 2002. Dr. S's report reflects that he examined the claimant on April 5, 2004, and he assessed a 27% IR based on the claimant's condition as of the date of statutory MMI. Dr. S based his 27% IR on 8% impairment due to specific disorders of the spine from Table 49 (II)(E) for surgically treated disc lesion with residual symptoms, and an unknown percentage for range of motion (ROM), for a combined value of 27%

whole person impairment.¹ In reviewing Dr. S's report, we note the 8% IR assessed by Dr. S considers impairment from the claimant's spinal surgery that occurred after the date of MMI and violates Rule 130.1(c)(3) as it has been interpreted. In view of the evidence presented, the hearing officer erred in determining that the findings of Dr. S are a valid certification that the claimant had a 27% IR as of the date of statutory MMI, and that the great weight of credible medical evidence is not contrary to the findings of Dr. S.

Consequently, the only report in evidence to be considered pursuant to Section 408.125(e) and Rule 130.1(c)(3), that reflects an assigned IR at the time of MMI, is from the prior designated doctor, Dr. L. Dr. L examined the claimant on March 28, 2001, and he assessed a 9% IR based on the claimant's condition as of the date statutory MMI. Dr. L based his 9% IR on 7% impairment due to specific disorders of the spine from Table 49 (II)(C), unoperated with "more than six month documentation of pain and recurrent muscle spasm with moderate to severe changes on structural tests," and 2% impairment ROM from Table 56, impairment due to abnormal motion of the lumbosacral region, for a combined value of 9% whole person impairment.

¹ We note that: (1) Table 49, Section (II)(E) lists 10%, rather than 8%, for a whole person impairment of the lumbar spine (see page 73 of the AMA Guides); and (2) Dr. S's report states in the Physical Examination section, that "[ROM] testings and Impairment Ratings on Specific Disorders are attached," however, those attachments were not in evidence.

Accordingly, we reverse the hearing officer's determination that the claimant's IR is 27% as assigned by the designated doctor and render a new decision that the claimant's IR is 9% as assigned by Dr. L.

The true corporate name of the insurance carrier is **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.**

Veronica L. Ruberto
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Margaret L. Turner
Appeals Judge